No. 93-1462

In The

Supreme Court of the United States

October Term, 1994

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

v.

JOSE RAMON MORALES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' REPLY BRIEF

DANIEL E. LUNGREN,
Attorney General of the
State of California
GEORGE WILLIAMSON,
Chief Assistant
Attorney General
KENNETH C. YOUNG,
Senior Assistant
Attorney General
JOAN W. CAVANAGH,
Supervising
Deputy Attorney General
JAMES CHING,
Supervising Deputy
Attorney General
Counsel of Record
1515 K Street, Suite 511
Sacramento, California 95814
Telephone: (916) 323-1948

Attorneys for Petitioners

G. LEWIS CHARTRAND, JR.
Chief Counsel
California Board of
Prison Terms
428 J Street
Sacramento, California 95814
Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND CODES

SUMMARY OF THE ARGUMENT

Morales v. Cal. Dept. of Corrections, 16 F.3d 1001 (9th Cir. 1994), the Ninth Circuit opinion below, suffers from two grave defects. The first is readily apparent on its face and the other is not.

First, *Morales* explicitly holds that a retrospective reduction in the frequency of parole *suitability* hearings violates the prohibition against ex post facto laws. In other words, the Ninth Circuit, on the basis of a wholly inadequate record, found that Morales had met his burden of proof on habeas corpus, bringing forth convincing evidence that he was in custody contrary "in violation of the Constitution". 28 U.S.C. section 2241(3). However, the record discloses that Morales did not and could not put forth even a colorable argument that the alleged violation worked more than mere speculative, insubstantial harm to him, and therefore *Morales* must be reversed because Morales' claims have no practical substance under *Weaver v. Graham*, 450 U.S. 24, 32 (1981). This is the approach suggested by the concurring opinion in *Collins v. Youngblood*, 497 U.S. 37, 58 (1990) [Stevens, J., concurring]. The undisputed findings of the parole board, based on the particular facts of respondent's case, establish the lack of harm to respondent and that it was not the amendment of the law which led to the postponement of the suitability hearings but rather respondent's own deeds. There was nothing categorical about the parole board's decision.

A more subtle and important defect, and one that undermines both *Morales* and *Roller v. Cavanaugh*, 984 F.2d 120 (4th Cir. 1993), *cert. granted*, 113 S.Ct. 2412, *cert. dism.*, 114 S.Ct. 593, is the unspoken evasion of this

Court's majority holding in *Collins v. Youngblood, supra* at 50. *Collins* states unequivocally that as a threshold matter, no inmate may claim that he has been subjected to an ex post facto law unless the law in question is within one of four categories outlined in *Calder v. Bull*, 3 Dall. 386, 390 (1789). In the instant case, the only plausible relevant category is the third *Calder* category, increase in punishment. Yet absent in both *Morales* and *Roller* is any discussion of how the particular parole procedure at issue increases punishment greater "than the law annexed to the crime[] when committed".

This Court cannot accept the unstated and uncritical premise of *Morales* and *Roller* that *all* parole procedures are a part of criminal punishment and simultaneously honor the analysis in *Collins* and *Calder*. *Morales* itself suggests that *Warden v. Marrero*, 417 U.S. 653, 662 (1974), *reh. den.*, 419 U.S. 1014, holds that all parole procedures are within a *Calder* category, a contention that will not bear close examination.

In light of the substantial number of cases extant among the circuits as to the application of the ex post facto clause to various parole procedures, it is necessary for this Court to state unequivocally that no new parole procedure implicates the ex post facto clause unless the change comes within a *Calder* category as integral to the criminal term itself. Unless a parole procedure or condition was pronounced as part of or as a contemporaneous adjunct to a term of years, that parole is not part of the punishment imposed and no ex post facto argument may be entertained. The majority and concurring approaches outlined in *Collins* appear to be irreconcilable in the contexts of the instant case and *Roller*. Therefore, this Court

must reexamine the issue and state which is the true test for ex post facto claims regarding parole.

ARGUMENT

THE EX POST FACTO CLAUSE DOES NOT BAR RETROSPECTIVE APPLICATION OF A LAW AUTHORIZING LESS FREQUENT PAROLE SUITABILITY HEARINGS WHEN THE PAROLE BOARD, IN THE EXERCISE OF ITS STATUTORY AND DISCRETIONARY POWERS, DETERMINES THAT MORE FREQUENT HEARINGS WOULD BE FUTILE

In the instant case, the Ninth Circuit held that the 1981 amendment of section 3041.5(b)(2) was an ex post facto law as to respondent. In doing so, the Ninth Circuit found that the 1981 amendment "denied Morales opportunities for parole that existed under prior law, thereby making [his] punishment . . . greater than it was under the law in effect at the time his crime was committed." *Morales v. Cal. Dept. of Corrections, supra* at 1004.[1] Petitioners have demonstrated that respondent did not present even a colorable case of detriment or harm, let alone convincing evidence (*Sumner v. Mata*, 449 U.S. 539, 551 (1981)), and therefore there was no factual basis for relief, i.e. for the district court to hear the petition or grant relief

[1] Respondent, without citation, seems to imply that he may not ask for a suitability hearing if it had been determined that he would not receive annual suitability hearings. Resp. Brief at 17. The record is devoid of any evidence to support this claim and the practice of the Board is that it will review for merit any communication from an inmate asking for an earlier suitability hearing.

under sections 2241(3) and 2254 of Title 8, U.S. Code.[2] Pet. Brief on the Merits at 21; see *Weaver v. Graham, supra* at 32.

---

[2] Respondent claims that his term of imprisonment, had parole been granted at the initial suitability hearing, would be "slightly less than 12 years" or 1994. Resp. Brief at 19, fn. 14. This contention is based on a profound misconception of California law regarding sentencing. First, respondent claims that his postconviction credit based upon section 2931 of the California Penal Code applies to his term of imprisonment, but in reality it only applies to his minimum eligible parole date, i.e. the date upon which he receives his first suitability hearing. It has nothing to do with setting a parole date other than its effect on when the initial suitability hearing is held. *In re Diaz*, 13 Cal.App.4th 1755, 1760, 17 Cal.Rptr.2d 395 (Ct.App. 1993); *In re Dayan*, 282 Cal.Rptr. 269, 271 (Ct.App. 1991); *In re Monigold*, 139 Cal.Rptr. 689, 702 (Ct.App. 1983).

Second, the suggestion that the Board of Prison Terms would depart from the guidelines to give respondent a *lesser* term than the norm is patently absurd. The Board clearly felt that respondent was such an undeserving candidate for parole that it refused to give him annual suitability hearings. A fortiori, it would not have given him an early parole date. The suggestion that the Board would, in its discretion, award respondent four months of credit per annum against the parole date when awarded is similarly flawed. No such credit appears in the record, despite the fact that such credit could be awarded during an initial suitability hearing if the inmate had been found suitable for parole.

Respondent appears unwilling to admit that the Board's clear and unanimous conclusion was that he was simply and totally unworthy of annual suitability hearings or a parole date, much less credit to reduce a parole date. Instead of making reference to the record, he indulges in fantasy and speculation about what might have happened had he not been the person he is. In this, he simply emulates the Ninth Circuit's approach to the problem.

"The ex post facto clause does not deal with fiction." *Watson v. Estelle*, 886 F.2d 1093, 1097 (9th Cir. 1989). If the new parole condition is no more onerous than the previous state of affairs, there can be no ex post facto claim. See *Lightsey v. Kastner*, 846 F.2d 329, 333-334 (5th Cir. 1988), *cert. den.*, 109 S.Ct. 807; *Tripati v. U.S. Parole Comm.*, 872 F.2d 328, 330 (9th Cir. 1989). Consequently, *Morales* should be reversed on this jurisdictional basis alone. This result would be in agreement with the concurring opinion in *Collins*:

> The mere possibility of a capricious and unlikely windfall is not the sort of procedural protection that could reasonably be judged substantial from the perspective of the defendant at the time the offense was committed.

Collins v. Youngblood, supra at 61 [Stevens, J., concurring];[3] see *Dobbert v. Florida*, 432 U.S. 282, 292, fn. 6 (1977).

However, the majority opinion in *Collins* had sought to repudiate the doctrine that showing detriment was enough to establish an ex post facto violation. "[M]ere disadvantage to the defendant will not result in an ex post facto problem." *U.S. v. Johns*, 5 F.3d 1267, 1271 (9th Cir. 1993). Statutes violate the ex post facto clause only when they come within four categories outlined in *Calder v. Bull, supra* at 390. In the instant case, the only possible applicable *Calder* category is the third. Respondent must

---

[3] Respondent misunderstands this argument when he states there is no de minimis violation of the ex post facto clause. Resp. Brief at 37. The primary jurisdictional issue is whether petitioner failed to meet his burden of proof on habeas corpus, as the petitioners failed to do in *Collins* and in *Powell v. Ducharme*, 998 F.2d 710, 715 (9th Cir. 1993).

show that the altered frequency of the parole suitability hearings increases the punishment for his crime. *Collins v. Youngblood, supra* at 42; see *Miller v. Florida*, 482 U.S. 423, 429 (1987); *Malloy v. South Carolina*, 237 U.S. 180, 183-184 (1915); *Tapia v. Superior Court*, 807 P.2d 434, 441 (Cal. 1991).

Thus a second weakness of *Morales* (and of *Roller*) is that neither obeys this Court's explicit directive in *Collins* that no harm to the inmate, no matter how substantial, will implicate the ex post facto clause unless the changed law is within one of four *Calder* categories.[4] *Roller*, for example, cites *Collins* as authority for the proposition that "changes in the manner of reimposing sentence after the original sentence is set aside" do not present ex post facto problems. *Roller v. Cavanaugh, supra* at 123, fn. 4. Such use

---

[4] Respondent constantly confuses whether there is a factual basis for postponement of the suitability hearings with the principal legal issue in *Collins*, i.e. whether the amended statute increases the punishment for the crime. The amended statute itself does not mandate postponement for all, i.e. it did not expand "the class of prisoners subject to . . . delays" as respondent claims. Resp. Brief at 4. Rather it is the facts of respondent's case which, in the considered opinion of the prison board, led to the postponement. Thus, it is erroneous to claim that respondent was "categorically unsuited" for parole because of the enactment of the amended statute (Resp. Brief at 39) or that "the 1981 amendment denies [parole] for three years." Resp. Brief at 18. The amended statute provided for an exercise of discretion. That exercise of discretion, embodied in the statutorily authorized findings of the parole board, vitiates both the substantial harm argument and the argument that the amendment works to the harm of whole categories of inmates.

of *Collins* betrays a misunderstanding of the importance of that case.[5]

Yet another example of how this aspect of *Collins* has not been honored in the parole area is *Flemming v. Ore. Bd. of Parole*, 998 F.2d 721, 724-725 (9th Cir. 1993). First, the main *Collins* holding regarding the *Calder* categories is ignored. *Id.* at 723. Second, *Weaver* is read to hold that any reduction of early release opportunities occasioned by the reduction of credits against the sentence violates the ex post facto clause. *Id.* at 724; *Weaver v. Graham*, 450 U.S. 24, 33 (1981). We are told that Weaver's opportunity to shorten his time in prison was the crucial factor in the case, not whether or not the credits were part of the sentence under *Calder*.[6]

In a similar fashion, *Morales* cites *Collins* solely for the proposition that a more burdensome punishment would be an ex post facto law, while ignoring the *Calder* categories altogether. *Morales v. Cal. Dept. of Corrections, supra* at 1003. *Morales* then cites *Warden v. Marrero, supra* at 662 for the proposition that "the denial of parole is part of a defendant's punishment". As pointed out by the States of Pennsylvania and Georgia in their amicus curiae

---

[5] Respondent makes much of cases which supposedly hold that parole is annexed to the crime within *Calder*. Resp. Brief at 14, fn. 9. Of much greater concern in the instant case are those courts which have chosen to ignore the necessity of making such a finding, including the Ninth Circuit. See *infra* at 12 et seq.

[6] Similarly lacking in *Collins/Calder* analysis are *Flemming v. Oregon Bd. of Parole*, 998 F.2d 721, 724-727 (9th Cir. 1993) and *Nulph v. Faatz*, 27 F.3d 451, 454 (9th Cir. 1993). Even *Powell v. Ducharme, supra*, a case which at least managed to reach the right conclusion, fails to give proper deference to *Collins*.

briefs, *Marrero* cannot stand for this broad proposition. Brief of Amicus Curiae State of Pennsylvania at 4 et seq.; Brief of Amicus Curiae State of Georgia at 6.

The point made by *Marrero* is that under the specific sentencing statute in question, eligibility for parole was determined at the time of sentencing and therefore was part of the punishment pronounced in the case. To put it another way, "parole eligibility [was] a function of the length of the sentence fixed by the district judge". *Warden v. Marrero, supra* at 654.[7]

In *Marrero*, the parole board's discretion to decide the prisoner's release date did not override the sentencing court's decision because:

> [I]t could not be seriously argued that sentencing decisions are made without regard to the period of time a defendant must spend in prison before becoming eligible for parole, or that such decisions would not be drastically affected by a substantial change in the proportion of the sentence required to be served before becoming eligible [for parole]."

Id. at 658.

Thus, an inmate under a hypothetical system of state sentencing who received a determinate sentence *and* parole would present the clearest case for an ex post facto argument if the determinate term of parole was later changed to the inmate's detriment. An inmate who received a 15-year term for murder and a subsequent 5-year parole term pronounced at the time of sentence would clearly be within the third category of *Calder* if the term of parole were later amended to a 10-year term.[8]

On the other hand, an inmate sentenced to an indeterminate term, with parole suitability to be determined later by the parole board, has no ex post facto claim if the board later decides to review his suitability for parole every three years instead of annually. A "pragmatic view of sentencing" (*id.* at 654) should govern, and the principal issue should be whether the parole in question is integral to the sentence, i.e. was pronounced as part of or as a contemporaneous adjunct to a term of years. If it is not, then the "parole [issue] arises *after* the end of the criminal prosecution, including imposition of sentence"

---

[7] Contrary to respondent's suggestion, California law does not require that elaborate advisement of parole possibilities be made during sentencing to an indeterminate term. As stated in *People v. Huynh*, 281 Cal.Rptr. 785, 795 (Ct.App. 1991):

> The United States Supreme Court has indicated there is no federal constitutional requirement that the state "furnish a defendant with information about parole eligibility" prior to a guilty plea. (*Hill v. Lockhart* (1985) 474 U.S. 52, 56 . . .) We do not regard the ordinary minimum term before parole eligibility to be a direct consequence of a conviction. . . . [D]efendant's possible parole is dependent on the Board of Prison Term's evaluation of his conduct as a prisoner. Elaborate judicial advice about the prospect of parole and the effects of conduct and worktime credits is not required. . . . We will not require trial courts to read the Board of Prison Term's parole eligibility regulations to defendants in anticipation of a guilty plea.

[8] This form of rigid determinism is apparent in the pre-Guidelines federal sentencing discussed in *Marrero* as well as the current Guidelines sentencing. See *U.S. v. Seacott*, 15 F.3d 1380,.1384 (7th Cir. 1994).

and therefore cannot be within *Calder* or *Collins*. *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972); *Warden v. Marrero*, *supra* at 659, fn. 9.[9]

Marrero contains dicta which may be misinterpreted because of a confusion in the meaning of the term "parole eligibility":

> There are additional reasons [not arising from statutory interpretation] for believing that the no-parole provision is an element of respondent's "punishment." First, only an unusual prisoner could be expected to think that he was not suffering a penalty when he was denied eligibility for parole. . . . Second, a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the *ex post facto* clause . . . of whether it imposed a "greater or more severe *punishment* than was prescribed by law at the time of the . . . offense". . . .

Id. at 662-663. The phrase "parole eligibility" as used in *Marrero* does not have the same meaning as the phrase "parole suitability" in California law. "Parole eligibility" refers to the general possibility of parole. "Parole suitability" is a term of art with precise technical meaning.[10]

---

[9] Those cases which emphasize that there is no ex post facto violation where the parole board has great discretion are explainable as cases which hold there is such a great separation between the imposition of the criminal sentence and the setting of a parole date as to vitiate any claim that parole is linked to the sentence. See *Malek v. Haun*, 26 F.3d 1013, 1016 (10th Cir. 1994); *Freeman v. State*, 809 P.2d 1171, 1176 (Ida. 1991).

[10] For example, respondent uses the term "parole consideration". Resp. Brief at 6. Such imprecise phrasing illustrates the need to closely examine the relevant California law. An inmate is before the Board of Prison Terms to determine his *suitability* for parole and not to *consider* his *eligibility* for parole.

Marrero must be read to say that a penalty is lengthened within the ex post facto clause when an inmate who might have paroled at the time of the commission of his offense is held to be denied any possibility of parole by a subsequent law. By contrast in the instant case, a California inmate who receives an extension of the time between parole suitability hearings is necessarily one sentenced to an indeterminate life sentence and therefore there are no defined or specific number of years in his term. Moreover, under California law the inmate has no specific date when he must be given parole and no commitment has been made to give the inmate parole. See generally *In re Jackson*, 703 P.2d 100, 101 (Cal. 1985).

Therefore, the "parole eligibility" situation presented in *Marrero* is not now before this Court. *Marrero* deals with a change in the minimum number of years before parole becomes a possibility and its broad language has been misinterpreted by courts to cover every aspect of the parole process. The salient features of the California parole procedure in the instant case present an opportunity for this Court to correct this misinterpretation and remind the lower courts of the primary analysis set forth in *Collins*. Unlike *Marrero*, the instant case deals with an inmate whose parole suitability is unconnected with the sentence pronounced by the trial court. The indeterminate life sentence received by the respondent contained no promise of parole, let alone a date certain for parole. Indeed, the respondent's prospects for obtaining a parole

date are so speculative that it would be a waste of time to consider his status annually and the parole board so found as it was required to do by state law. See Cal. Penal Code section 3041.5(b)(2)(B).

Petitioners have previously pointed out that the cases cited by *Roller* have incorrectly reasoned that a retroactive reduction in the frequency of parole consideration violates the ex post facto clause. Pet. Brief on the Merits at 19 et seq. It is instructive to review these cases and those cited in *Morales* and *Flemming* in light of what appears to be a reasonable interpretation of *Marrero*. See *Roller v. Cavanaugh, supra* at 123; *Morales v. Cal. Dept. of Corrections, supra* at 1004; *Flemming v. Ore. Bd. of Parole, supra* at 724.

In *Shepard v. Taylor*, 556 F.2d 648 (2d Cir. 1977), the parole board during its 1977 parole revocation considered a 1976 parole criterion which was not in effect when the inmate was convicted in 1972. *Id.* at 652. Citing *Marrero* for the proposition that parole eligibility is an integral part of the sentence, the court found that use of the new criterion was a violation of the ex post facto clause.[11] *Id.* at 654.

---

[11] Inter alia, the court cited *Love v. Fitzharris*, 460 F.2d 382 (9th Cir. 1972), *vac. as moot*, 409 U.S. 1100. *Love* is close to *Morales* in that *Love* held that the minimum period of time prior to parole eligibility may not be changed to the inmate's detriment without implicating the ex post facto clause. *Love* is regularly cited despite the fact that the opinion was vacated by this Court and is a nullity. *Roller v. Cavanaugh, supra* at 123; e.g. *Warden v. Marrero, supra* at 663; *U.S. v. Paskow*, 11 F.3d 873, 878 (9th Cir. 1993); *Akins v. Snow*, 922 F.2d 1558, 1561 (11th Cir. 1991).

In fact, *Shepard* is primarily a case turning on detriment analysis rather than the *Collins/Calder* analysis. *Id.* Although *Calder* is mentioned in *Shepard, Marrero* is taken to mean that "parole eligibility is considered an integral part of any sentence". Therefore, "official post-sentence action that delays eligibility for supervised release runs afoul of the ex post facto proscription". Moreover, based upon a rather broad reading of *Lindsey v. Washington*, 301 U.S. 397 (1937), *Shepard* concludes that the ex post facto clause has been transgressed "even if the maximum statutory penalty for the crime remains unchanged." *Shepard v. Taylor, supra.*

Rodriguez v. U.S. Parole Comm., 594 F.2d 170 (7th Cir. 1979) follows the letter of the law in declaring the principal issue to be whether a particular parole procedure makes the punishment for a crime more burdensome. *Id.* at 173. However, *Rodriguez* then cites *Marrero* for the proposition that when Congress had made it clear that the parole procedure was part of punishment, parole is an extension of the sentencing process, the ex post facto clause is brought into play. *Id.* at 175-176. *Rodriguez* and *Marrero* are similarly limited to their facts and cannot be used to generalize about all revisions of parole procedures.

U.S. ex rel. Graham v. U.S. Parole Comm., 629 F.2d 1040 (5th Cir. 1980) concerned the timing of parole hearings. Most instructive is its use of two hypothetical situations which illustrate the court's concept of ex post facto doctrine. *Id.* at 1043-1044.

> Assume that, under the amended regulations, the Parole Commission schedules Prisoner X at his initial hearing for presumptive release in

three years and six months. Two years later, at X's interim hearing, the evidence reveals that he has been a model prisoner and has attained a college degree since the time of his initial hearing. If the Parole Commission does not deem these circumstances "clearly exceptional" [as required under the amended subsequent regulations], then it will not advance X's presumptive release date, and he will be required to spend another year and a half in jail. Now assume that X's parole eligibility is governed by the regulations in effect in 1974 [, prior to the amendment of the regulations]. At X's three-year review hearing, the Parole Commission, unconstrained by a "clearly exceptional circumstances" standard, might well be convinced by the same evidence to advance his presumptive release date six months and release him immediately. Thus, in this scenario, the net effect of the "clearly exceptional circumstances" is to postpone X's release on parole and keep him incarcerated for an additional six months.

The court's implication is that if the Parole Commission feels itself constrained by the new standard, this would be a violation of the ex post facto clause. Clearly, *Graham* is both a procedure/substance and a substantial detriment case and therefore it lacks the *Collins* analysis. Its "procedure-substance" distinction discredits it under *Collins*. *Id.* at 1044. Its utility is limited by its failure to discuss *Calder* and its assumption that *Marrero* had determined that all parole procedures were within *Calder*. *Id.* at 1042-1043. Moreover, the court seems to imply that if the Parole Commission's discretion is exercised in any way but one, it violates the Constitution. The court seems to

override the parole board's discretion without consideration of the connection between the criminal sentence and the timing of the parole hearings.

Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989) utilizes the *Marrero* dictum that a repealer of parole eligibility previously available would create a serious ex post facto question. *Id.* at 305; *Warden v. Marrero*, *supra* at 663. Without further discussion, the court then held that a subsequent statute which withdrew parole eligibility altogether was a violation of the ex post facto clause.[12]

Watson v. Estelle, 859 F.2d 105 (9th Cir. 1988) is clearly a dead letter, having been vacated and replaced by the opinion at 886 F.2d 1093 (9th Cir. 1989). The latter case finds that the parole procedure in question was not more onerous than the prior state of the law and therefore could not be a constitutional violation. *Id.* at 1071.

Akins v. Snow, 922 F.2d 1558 (11th Cir. 1991), *cert. den.*, 111 S.Ct. 2915 is, like *Rodriguez*, squarely on point. However, its holding is questionable because it does not deal with the primary issue in *Collins*, whether the particular parole procedure comes within the *Calder* categories. *Id.* at 1561. *Akins* assumes it does and cites *Rodriguez* for the point that the ex post facto clause is implicated when an opportunity for parole that existed prior to the alteration of the parole rules is eliminated. *Id.* at 1562. Finally, *Akins* cites *Marrero* as support for the proposition that parole

---

[12] The same weaknesses in *Fender* are replicated in *U.S. v. Meeks*, 25 F.3d 1117, 1120 (2d Cir. 1994), a case which relies on *Fender* as precedent. *Meeks* baldly states that supervised release and parole are an integral part of the punishment for the underlying offense. *Id.* at 1121.

eligibility procedures are subject to ex post facto limitations. *Id.* at 1563. *Akins* was wrongly decided because it rests on overly broad interpretations of *Marrero* and *Rodriguez*.

Williams v. Bd. of Parole, 812 P.2d 443 (Ore. 1991) holds the same as *Flemming* with regard to a change in the state's calculation of sentence reduction. The 1991 opinion is rather cursory and the more trenchant superseding opinion is reported at 828 P.2d 465 (1992). However, the successor opinion is devoid of any discussion of *Calder* and is not of any greater value than *Flemming* on the particular point of law in question. In the second round, although the state properly pointed out that the Oregon Court of Appeals first had to consider whether the new rules were part of the law annexed to the offense when it was committed, i.e. that *Calder* categorization was the first step, the court simply stated that *Weaver* foreclosed the inquiry. *Williams* holds in imprecise fashion that:

> [A]n enactment that substantially alters the consequences attached to a completed crime changes the "quantum of punishment" and cannot be applied if it operates to a prisoner's detriment.

Id. at 466. The fact that such a statement could be made in 1992, two years after *Collins*, and in an opinion which does not cite to *Collins* at all, indicates how far courts have strayed from the plain and simple meaning of *Collins*.

These cases, in sum, evidence a fundamental failure to understand the main *Collins/Calder* analysis or to apply *Marrero* in a correct and limited fashion. In the field of

parole, therefore, this Court is faced with a plethora of cases which are overbroad and overintrusive into an area of fundamental state concern, the parole of inmates. Unless this Court takes firm action, the incorrect analysis contained in the principal cases will justify the wholesale revision of parole by the district courts.

CONCLUSION

The Ninth Circuit erred in this case in two ways. First, it substituted a supposition of harm for the showing of substantial detriment required by section 2241 and *Weaver*. Second, it has failed to follow the *Collins/Calder* analysis and has assumed that all parole procedures, no matter what their specific technical and legal context, are part of punishment, i.e. always within the third *Calder* category.

Either is a strong basis for reversal, but a review of the principal cases dealing with claims of ex post facto parole procedures evidences a confusion so great about basic principles that this Court should state the true meaning of *Marrero* as it applies to parole procedures. When *Collins* issued, it was conceivable that its main and concurring opinions could have existed in harmony with each other. The instant case and *Roller* clearly indicate that this conceivable harmony has not been achieved and

that this Court should indicate to its subordinate courts which analysis they must follow in the future.

Respectfully submitted,

DANIEL E. LUNGREN,
Attorney General of the
State of California
GEORGE WILLIAMSON,
Chief Assistant Attorney General
JAMES CHING,
Supervising Deputy Attorney
General
Counsel of Record

Attorneys for Petitioners

Dated: December 19, 1994